

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000235-001 DT

01/30/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

ANTHONY H LUICK

RONALD J NEWMAN

v.

ARIZONA STATE BOARD OF
PSYCHOLOGICAL EXAMINERS (001)

NANCY J BECK

DOCKET-CIVIL-CCC
OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

IT IS ORDERED directing the Civil Docket Clerk to amend the caption in this cause to show the Defendant as ***ARIZONA STATE BOARD OF PSYCHOLOGIST EXAMINERS***, rather than Arizona State Board of Psychological Examiners.

This administrative review action has been under advisement since the time of oral argument on December 3, 2003. This decision is made within sixty (60) days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings before the Board of Psychologist Examiners and the memoranda and oral arguments submitted by counsel.

This Court has jurisdiction over this case pursuant to A.R.S §12-910(e), and this Court is charged with the review of administrative decisions in proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to

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law, is arbitrary and capricious or is an abuse of discretion.¹

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.² The reviewing court may not substitute its own discretion for that exercised by the agency or Board³, but must only determine if there is any competent evidence to sustain the decision.⁴

Dr. Anthony Luick is a licensed psychologist practicing in Tucson, Arizona. In September of 1998, Plaintiff began treating a minor child, A.P. A Petition for Dependency was filed with the Juvenile Court on behalf of A.P. seeking protection and court intervention. The Superior Court found A.P. to be dependent and ordered Plaintiff to supervise "therapeutic visitation" between A.P. and his father. Both of A.P.'s parents were not indigent and agreed to pay for Plaintiff's services. Plaintiff properly provided a letter to both A.P.'s parents memorializing their payment agreement; however, A.P.'s father refused to sign the letter. A.P.'s father later refused to make payment for the Plaintiff's services. The Plaintiff was forced to file a lawsuit in the Pima County Justice Court, which he ultimately won. Following judgment in favor of the Plaintiff, A.P.'s father then filed a formal complaint with the Defendant Board of Psychologist Examiners (hereinafter referred to as "the Board"). The Board properly notified the Plaintiff of the complaint made by A.P.'s father, and Plaintiff responded by letter to the complaint. At a meeting of the Board on February 1, 2002, the Board concluded that it needed more information and voted to hold an informal interview with the Plaintiff. The informal interview was scheduled August 3, 2002.⁵

At the informal interview on August 3, 2002, the Board heard from A.P.'s father and the Plaintiff. Plaintiff was not represented by counsel at this informal interview. A Board member made a motion to find that Dr. Luick had failed or refused to maintain adequate business or professional records relating to the services relating to a client. This motion failed. A subsequent motion at this first informal interview did pass, wherein the Board concluded that the Plaintiff had committed unprofessional conduct by engaging in activities as a psychologist that are unprofessional. The Board then postponed further disposition of the matter to its next meeting. The informal interview was then continued to October 5, 2002. At that informal interview the Plaintiff appeared with counsel. The Plaintiff and his counsel were provided with notice of the October 5, 2002 meeting in a letter dated August 28, 2002, signed by Board Executive Director, Maxine McCarthy.⁶ This notice specifically referenced the fact that the

¹ A.R.S. Section 12-910(e).

² *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980).

³ *Ariz. Dept. of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

⁴ *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz. App. 432, 484 P.2d 201 (1971).

⁵ The Board's procedures permit its licensees to decline an informal interview, and to request a more formal proceeding, i.e. a hearing. The Plaintiff, Dr. Luick, never requested formal proceedings in this case.

⁶ Certified Record from the Board of Psychologist Examiners, tab 34.

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issues to be addressed would include all of the issues identified in the Board's letters of June 21 and July 9, 2002. Specifically, the notice also provided: "As our letters of June 21, 2002 and July 9, 2002 indicated, one of the two issues in the case was that you may have engaged in billing irregularities regarding five patients, including A.S."⁷ After further discussion, and after hearing from Plaintiff's counsel and counsel for the Board, the Board adopted Findings of Fact, Conclusions of Law, and a Decree of Censure, finding four instances of unprofessional conduct:

1. Dr. Luick charged a patient's father for time he spent responding to the father's ethical complaint to the Board of Psychologist Examiners;
2. Dr. Luick charged the patient's father interest at the rate of 24% without a written contract;
3. Dr. Luick charged a patient's father an "administrative fee" for time spent writing an unsolicited letter to the patient's father's attorney about the father's ethical complaint to the Board of Psychologist Examiners; and
4. Dr. Luick discarded client records which, are required by law to be retained.⁸

The Plaintiff has timely filed this administrative review action in the Superior Court.

The first issue raised by the Plaintiff is his contention that the Board's findings and conclusions are not supported by the evidence. Specifically, Dr. Luick argues that there is no current standard of practice which prohibits a psychologist from charging interest rates in excess of 10%. The doctor also argues that it is not unlawful to charge an interest rate in excess of 10%. However, the Plaintiff ignores the clear language found in A.R.S. Section 44-1201, quoted by the Board in its Findings of Fact and Conclusions of Law.⁹ That statute permits interest rates in excess of 10% per year only where a different rate is contracted to in writing between the parties. In this case there is no question but that A.P.'s father refused to sign any type of contract or agreement for the payment of fees with Dr. Luick. As a matter of law, Dr. Luick's interest rate of 24% was charged in violation of A.R.S. Section 44-1201.

This Court has reviewed the record and determines that substantial evidence exists to support each of the factual findings made by the Board in this case.

The Plaintiff also contends that the continued informal interview held on October 5, 2002 "constituted an irregularity in the administrative proceedings," and denied the Plaintiff his rights of due process as guaranteed by Article II, Section 4 of the Arizona Constitution. Without

⁷ Id., at page 2.

⁸ Board's certified record on appeal, Findings of Fact, Conclusions of Law, Decree of Censure and Order for Civil Penalty, dated November 5, 2002, at tab 1.

⁹ Id., at page 3.

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question, it is the law in the State of Arizona that a licensee is entitled to due process rights throughout administrative proceedings, such as those which occurred in this case. Due process of law means a “fair trial in a fair tribunal.”¹⁰ However, the requirements of due process vary with the type of proceeding, the private and governmental interests at stake, and the risk that the procedure will lead to erroneous results.¹¹ With few exceptions, the law is well established that the combining of investigatory and adjudicatory functions in an administrative proceeding, such as an informal interview, does not violate due process.¹² This Court also notes that the Plaintiff did have the option of requesting the more formal and adversary process of a formal interview. The Plaintiff chose not to request such a procedure.

The Plaintiff contends that when a Board member’s motion failed on August 3, 2002 (regarding his record keeping) he had a right to rely upon that vote as dispositive of one of the charges. The Plaintiff is mistaken for the reason that this was not a final vote. More importantly, the Plaintiff was provided with specific notice prior to the next informal interview (held on October 5, 2002) that the same or similar issues concerning record keeping would be addressed by the Board. This Court concludes that the Plaintiff was provided with appropriate notice consistent with the requirements of due process. This Court also notes that an administrative proceeding is unlike a criminal proceeding where double jeopardy may attach following the dismissal of a charge to preclude that charge from being brought again.

The Plaintiff also contends that he was denied due process because of the “Board’s sudden reversal of itself without allowing Plaintiff’s counsel to respond, or present evidence, constitutes a violation of due process....”¹³ However, the record clearly does not support the Plaintiff’s contention. The record contains a transcript of the Board’s meeting of October 5, 2002. Plaintiff and his counsel were present throughout the proceedings. Plaintiff’s counsel was given the opportunity to address the Board twice.¹⁴ More importantly, having reviewed Plaintiff’s counsel’s comments before the Board in the October 5, 2002 meeting, it does not appear that Plaintiff’s counsel requested any opportunity other than to make argument on behalf of the Plaintiff. Plaintiff’s counsel never requested an opportunity to present evidence. Since Plaintiff’s counsel never requested an opportunity to present evidence, this Court must presume that this issue has been waived. In all other respects, this Court determines that the Plaintiff was not denied his rights of due process.

Finally, the Plaintiff contends that the penalty imposed by the Board is unduly harsh and excessive. The penalty that was imposed by the Board in this case is a decree of censure and a civil penalty of \$2500.00.

¹⁰ United States v. Superior Court, 144 Ariz. 265, 280, 697 P.2d 658, 673 (1985); Berenter v. Gallinger, 173 Ariz. 75, 82, 839 P.2d 1120, 1127 (App. 1992).

¹¹ In re: Maricopa County Juvenile Action J.D.-561, 131 Ariz. 25, 27, 638 P.2d 692, 694 (1981); Berenter v. Gallinger, 173 Ariz. at 81, 839 P.2d at 1127.

¹² Id. See, Rithrow v. Larkin, 429 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); In re: Ackel, 155 Ariz. 34, 745 P.2d 92 (1987); Sigmen v. Arizona Department of Real Estate, 169 Ariz. 383, 819 P.2d 969 (1991).

¹³ Plaintiff’s Opening Brief, at page 8.

¹⁴ Certified Record from the Board of Psychologist Examiners, tab 5, R.T. of October 5, 2002, at pages 53-55-57.

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The Arizona Court of Appeals has determined that an administrative sanction is excessive only if it is so disproportionate to the offense(s) so as to shock one's sense of fairness.¹⁵ And, where substantial evidence supports an agency's decision and its sanction is within the permissible dispositions authorized by Arizona law, the Court may not conclude that the agency's action is an abuse of discretion.¹⁶

The Plaintiff contends that the Board made no attempt to consider mitigating factors that might warrant a lesser sanction. However, the Board did hear from Plaintiff's counsel on the issue of sanctions. It is clear from the record that the Board chose not to be persuaded by counsel's arguments on behalf of the Plaintiff in mitigation of the violations determined by the Board. This Court finds no abuse of discretion as the sanctions imposed clearly fall within those authorized in cases such as this.

This Court must conclude based upon the record it that the Board's actions were supported by substantial evidence, did not violate the Plaintiff's rights of due process, and that the sanction imposed was not excessive.

IT IS THEREFORE ORDERED denying all relief as requested by the Plaintiff in his complaint.

IT IS FURTHER ORDERED affirming the determinations and decisions of the Defendant, Arizona Board of Psychologist Examiners.

IT IS FURTHER ORDERED that counsel for the Defendant Board shall lodge an order consistent with this minute entry no later than March 1, 2004.

¹⁵ Schillerstrom v. State, 180 Ariz. 468, 885 P.2d 156 (App. 1994); Bear v. Nicholls, 142 Ariz. 560, 691 P.2d 326 (App. 1984).

¹⁶ Id.